

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MASSIMILIANO DELLAGUARDIA, ) CASE NO. C06-1378-MJP  
)  
Petitioner, )  
)  
v. )  
)  
) REPORT AND RECOMMENDATION  
ALBERTO R. GONZALES, et al., )  
)  
Respondents. )  
\_\_\_\_\_ )

I. INTRODUCTION AND SUMMARY CONCLUSION

On September 26, 2006, petitioner Massimiliano Dellaguardia, proceeding through counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, challenging his continued detention by the U.S. Immigration and Customs Enforcement (“ICE”). (Dkt. #3). Petitioner argues that ICE lacks the constitutional and statutory authority to detain him because he obtained derivative United States citizenship in 1995 when his mother became a naturalized citizen. *Id.* On January 12, 2007, respondents filed a Return and Motion to Dismiss, indicating that petitioner was released from custody on October 19, 2006, and that petitioner’s removal proceedings were terminated on January 10, 2007. (Dkt. #17). Respondents assert that because

petitioner is no longer detained by ICE, petitioner's habeas petition should be denied and dismissed as moot. *Id.* Petitioner does not dispute that his habeas petition should be dismissed, but requests that this Court issue an Order finding that petitioner "derived his United States citizenship pursuant to 8 U.S.C. § 1431(a)(3) on May 3, 1995, when his mother, Belainesh Woldeab Habtai became a naturalized United States Citizen." (Dkt. #22, Proposed Order of Dismissal). Respondents reply that this Court lacks jurisdiction to make a determination regarding petitioner's citizenship. (Dkt. #23).

Having carefully reviewed the entire record, I recommend that petitioner's habeas petition (Dkt. #3) be dismissed as moot.

## II. BACKGROUND AND PROCEDURAL HISTORY

Petitioner Massimiliano Luigi Dellaguardia was born in April 1978 in Asmara, Ethiopia (now Eritrea). (Dkt. #19 at L2). On January 12, 1984, petitioner and his parents were admitted to the United States as refugees. (Dkt. #19 at L2, R1). Petitioner's parents separated in June 1984, and petitioner moved to Seattle, Washington with his mother. (Dkt. #22, Exs. A and B). Petitioner adjusted his status to lawful permanent resident on June 17, 1986, retroactive to his date of admission. (Dkt. #19 at R105). On May 3, 1995, petitioner's mother became a naturalized United States citizen. (Dkt. #22, Ex. D). On or about November 6, 1998, petitioner was convicted in the Kent Municipal Court of Fourth Degree Assault, Domestic Violence, and was sentenced to 365 days confinement. (Dkt. #19 at R202, 372).

On or about July 2, 1999, the former Immigration and Naturalization Service <sup>1</sup> ("INS")

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<sup>1</sup> Effective March 1, 2003, the Immigration and Naturalization Service was abolished pursuant to the Homeland Security Act of 2002, 116 Stat. 2135, Pub. L. 107-296, *codified at* 6

01 issued a Notice to Appear, placing petitioner in removal proceedings and charging petitioner with  
02 removability based on his 1998 conviction. (Dkt. #19 at R373-75).

03 On May 9, 2000, while his removal proceedings were pending, petitioner filed an  
04 Application for Certificate of Citizenship, which the INS District Director denied. (Dkt. #19 at  
05 R244-47, R265-67). Petitioner appealed the denial of his citizenship application to the  
06 Administrative Appeals Unit, who dismissed the appeal on October 17, 2000. (Dkt. #19 at R268,  
07 L227-29). Petitioner did not appeal this decision or file a Petition for Review with the Ninth  
08 Circuit.

09 On March 1, 2001, petitioner failed to appear for his removal proceedings and was ordered  
10 removed *in absentia* to Ethiopia. (Dkt. #19 at R370). Petitioner did not surrender for removal  
11 as ordered. (Dkt. #19 at R406, L239). On November 10, 2003, petitioner was taken into  
12 immigration custody following his arrest by the Seattle Police Department. (Dkt. #19 at R356).

13 On March 2, 2004, petitioner filed his first habeas petition, challenging his continued  
14 detention. (Dkt. #19 at L258-62); *See DellaGuardia v. Ashcroft*, Case No. C04-367-RSL-RSM.  
15 Petitioner was subsequently released by ICE on March 30, 2004, and his habeas petition was  
16 dismissed as moot. *DellaGuardia v. Ashcroft*, Case No. C04-367-RSL-RSM (Dkt. #15); (Dkt.  
17 #19 at L277-281).

18 Petitioner was taken back into immigration custody on September 11, 2006. (Dkt. #19  
19 at L282-83). At that time, ICE indicated that it had been working with the Embassy of Ethiopia  
20 to secure a travel document to that country, and that petitioner would remain detained pending

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22 U.S.C. § § 101, *et seq.*, and its immigration functions were transferred to the Department of  
Homeland Security (“DHS”).

01 his removal. *Id.* On September 22, 2006, petitioner filed the instant habeas petition and a motion  
02 for stay of removal. (Dkt. #1). The Court subsequently granted a temporary stay of removal  
03 pending a decision on the merits of this case. (Dkt. #8).

04 On October, 16, 2006, petitioner's parents filed a Decree of Legal Separation and Findings  
05 of Fact and Conclusions of Law in the King County Superior Court. (Dkt. #22, Exs. A & B). The  
06 Decree and Findings of Fact indicate that petitioner's parents were married on May 25, 1977, and  
07 separated on June 4, 1984. *Id.* Thereafter, attorneys for petitioner sent a letter to respondents,  
08 setting forth petitioner's claim that he derived United States citizenship from his mother under 8  
09 U.S.C § 1432(a), as a result of his mother's naturalization on May 3, 1995. (Dkt. #22 at 3). On  
10 October 19, 2006, petitioner was released from ICE custody pursuant to an Order of Supervision.  
11 (Dkt. #17, Ex. A). Additionally, Immigration Officials moved to dismiss petitioner's removal  
12 proceedings. (Dkt. #17 at 3, Dkt. #22, Ex. D). On January 10, 2007, petitioner's removal  
13 proceedings were terminated without prejudice. (Dkt. #17, Ex. B). Once petitioner's removal  
14 proceedings were terminated, the order of supervision also terminated.

15 On January 12, 2007, respondents filed a return and motion to dismiss. (Dkt. #17).  
16 Petitioner filed a response on February 26, 2007, Dkt. #22, and respondents filed a reply on March  
17 2, 2007, Dkt. #23. The habeas petition and motion to dismiss are now ready for review.

### 18 III. DISCUSSION

19 On September 22, 2006, petitioner filed the instant habeas petition, challenging the  
20 constitutional and statutory authority of ICE to detain him because he had derived United States  
21 citizenship. (Dkt. #3 at 3-5). Petitioner was subsequently released from custody on October 19,  
22 2006, and petitioner's removal proceedings were terminated without prejudice on January 10,

2007. (Dkt. #17). Respondents argue that petitioner's habeas petition should be denied and dismissed as moot because he is no longer detained by ICE. *Id.* Petitioner concedes that his habeas petition should be dismissed, but asks this Court to grant him derivative citizenship status pursuant to former 8 U.S.C. § 1432(a).<sup>2</sup> Petitioner claims that the parties agree that he is a United States citizen, and that the Court should find that petitioner meets the criteria for derivative citizenship status under 8 U.S.C. § 1432(a). (Dkt. #22). Respondents argue in opposition that petitioner has not followed the proper procedures to raise a citizenship claim, and, therefore, this Court lacks authority to consider the merits of petitioner's claim of derivative U.S. citizenship. (Dkt. #23). The Court agrees with respondents that petitioner's claim of derivative citizenship is not properly before this Court.

Where an individual is not in removal proceedings, he must seek citizenship by filing an Application for Certificate of Citizenship (Form N-600) with the U.S. Citizenship and Immigration Services ("USCIS"). 8 C.F.R. § 341.1. If the application for a certificate of citizenship is denied, he may appeal the denial to the Administrative Appeals Unit. 8 C.F.R. § 322.5(b). An applicant whose appeal is denied may seek judicial review under 8 U.S.C. § 1421(c).

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<sup>2</sup> The former INA § 321(a) stated, in relevant part, as follows:

(a) A child born outside of the United States of alien parents . . . becomes a citizen of the United States upon fulfillment of the following conditions:

. . .

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents . . . and if

(4) Such naturalization takes place while such child is under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time . . . the parent naturalized under clause . . . (3) of this subsection . . .

8 U.S.C. § 1432(a)(3) (repealed 2000).

01 A person whose application for naturalization is denied may seek review of such  
 02 denial before the United States District Court for the district in which such person  
 03 resides. Such review shall be de novo and the court shall make its own findings of  
 fact and conclusions of law and shall at the request of the petitioner conduct a hearing  
 de novo on the application.

04 8 U.S.C. § 1421(c).<sup>3</sup>

05 Here, petitioner has not shown that he applied for a certificate of citizenship by filing a  
 06 Form N-600 application with USCIS. Accordingly, there is no administrative determination to  
 07 review, and this Court lacks subject matter jurisdiction to adjudicate petitioner's claim of  
 08 derivative citizenship.

09 Because petitioner is no longer in ICE custody, the Court finds that petitioner's habeas  
 10 petition should be dismissed as moot. *See, e.g., Cooney v. Edwards*, 971 F.2d 345, 346 (9th Cir.  
 11 1992) (holding that the District Court properly dismissed plaintiff's claims that had become moot  
 12 or unripe).<sup>4</sup>

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 15 <sup>3</sup> An applicant whose naturalization application remains pending without a decision for  
 16 more than 120 days after the initial interview may also seek judicial relief under 8 U.S.C. §  
 1447(b).

17 <sup>4</sup> Petitioner argues that the mootness doctrine should not apply because "the threat that  
 18 ICE will take action to remove Mr. Dellaguardia still remains." (Dkt. #22 at 7 n. 4). For a federal  
 19 court to have jurisdiction, "an actual controversy must exist at all stages of the litigation."  
 20 *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002). "When a  
 21 controversy no longer exists, the case is moot." *Id.* An exception to the mootness doctrine exists  
 22 for cases that are "capable of repetition, yet evading review." *Murphy v. Hunt*, 455 U.S. 478, 481  
 (1982). To satisfy the "capable of repetition, yet evading review" exception, "there must be a  
 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur  
 involving the same complaining party." *Id.* at 482. Here, however, petitioner's contention that  
 he may be detained and subject to removal proceedings again is based on a mere theoretical  
 possibility, not a "reasonable expectation" or "demonstrated probability." *See id.* Accordingly,  
 the Court finds that petitioner's habeas petition is now moot.

IV. CONCLUSION

For the foregoing reasons, I recommend that this the action be dismissed as moot. A proposed Order accompanies this Report and Recommendation.

DATED this 20th day of June, 2007.

  
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Mary Alice Theiler  
United States Magistrate Judge